IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82 5088

CECIL C. JOHNSON, JR.,

Petitioner

V.

THE STATE OF TENNESSEE,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF

TENNESSEE

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THE QUESTIONS PRESENTED FOR REVIEW

I. Did the State's action in converting an alibi into testimony for the prosecution's case-in-chief accumulate with other prosecutorial improprieties to violate the petitioner's Sixth and Fourteenth Amendment rights with consequence to the verdicts of guilt and judgments of death?

A. Under what circumstances is a critical, subpoenaed alibi witness protected by the defendant's right to compulsory process such that successful prosecutorial intimidation violates the defendant's due process right to present a defense?

B. Once a defendant's alibi has been destroyed by prosecutorial misconduct, is the significance of lesser prosecutorial improprieties expanded to test whether the cumulative effect of the State's actions denied the petitioner a fair trial complying with due process?

II. Is expert testimony upon the general moral development of youth and the effect of age upon accountability for decision-making relevant to consideration of the petitioner's youth as a mitigating circumstance, once the issue of whether the petitioner could rely upon this factor had been joined in opening statements at the sentencing hearing, such that the exclusion of this evidence denied petitioner an opportunity to present a mitigating defense?

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MAY IT PLEASE THE COURT:

Cecil C. Johnson, Jr., the petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Honorable Supreme Court of the State of Tennessee, as entered on the 3rd day of May, 1982 with summary denial of a petition to rehear entered on the 21st day of May, 1982.

THE OPINIONS BELOW

The May 3rd, 1982 opinion of the Supreme Court of Tennessee is officially reported at 632 S.W.2d 542. The original draft of the opinion is appended to this petition (Appendix A).

A petition to rehear was filed on May 13th, 1982 and was summarily denied on May 21st, 1982. A copy of this order is appended to this petition (Appendix B).

Although the opinion below ordered the petitioner's execution on June 29th, 1982, the Supreme Court of Tennessee issued a stay pending the filing and disposition of this petition (Appendix C). Thus, petitioner does not seek a stay of execution from this Court.

The trial court made several written opinions and oral findings that are pertinent to this petition. The first of these include brief remarks made from the bench of the conclusion of the hearing upon the motion for a new trial on March 6th, 1981 (Appendix D). On March 9th, 1981, the trial court entered a written order denying the defendant's motion for a new trial (Appendix E). As this order makes numerical reference to the propositions set forth in the defendant's written motion and is not, therefore, comprehensible without reference to that text, petitioner's motion for a new trial is also appended to this petition (Appendix F).

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Tennessee was entered on May 3, 1982. A timely petition for rehearing was denied on May 21, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In all criminal prosecutions, the accused shall enjoy the right . ... to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Sixth Amendment, the
United States Constitution

. ...(N)or shall any state deprive any person of life, liberty, or property, without due process of law . . .

Fourteenth Amendment, the
United States Constitution

(a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any . . . robbery . ... is murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life.

Tenn. Code Ann. §39-2402 (1977)

(a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as a part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt . . .

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances . . . ; and any evidence tending to establish or rebut any mitigating factors . . .

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstances are not outweighed by any mitigating circumstances, the sentence shall be death . . .

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of one or more of the statutory aggravating circumstances, which shall be limited to the following . . . :

(3) the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder . . . ,

(6) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

(7) the murder was committed while the defendant was engaged in committing . . . any . . . robbery . . .

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) the defendant has no significant history of prior criminal activity . . .

(7) the youth or advanced age of the defendant at the time of the commission of the crime . . .

Tenn. Code Ann. §39-2404 (1977)

Whenever the death penalty is imposed for murder in the first degree and upon the judgment becoming final in the trial court, the defendant shall have the right of direct appeal from tht trial court to the Tennessee Supreme Court, which shall have exclusive appellate jurisdiction . . .

Tenn. Code Ann. §39-2406(a) (1977)

STATEMENT OF THE CASE

A. How did the case proceed in the courts below?

This crime occurred in Nashville, Tennessee on the evening of July 5, 1980. Cecil C. Johnson, Jr., the petitioner, surrendered himself to inquiring police officers on the next day. Within one (1) month, he had been indicted by the Davidson County Grand Jury as the sole perpetrator of seven (7) felonies arising from the episode. Upon a plea of not guilty, his trial began on the 13th day of January, 1981. On the 19th day of January, the jury returned verdicts of guilt upon each of the counts as originally indicted and sentenced the petitioner to the statutory maximum punishment as follows:

Count 1. Robbery Accomplished with the Use of a Deadly Weapon upon the bodies of Robert Bell, Jr. (the surviving owner of a neighborhood market) and Robert Bell, III (his twelve year old son) involving the theft of money --- Life Imprisonment;

Count 2. Robbery Accomplished with the Use of a Deadly Weapon upon the body of Louis E. Smith (a surviving auto mechanic working in the market) involving the theft of a driver's license --- Life Imprisonment;

Count 3. Murder in the First Degree upon the body of Robert Bell, III;

Count 4. Murder in the First Degree upon the body of James E. Moore (the driver of a taxicab parked in front of the market);

Count 5. Murder in the First Degree upon the body of Charles H. House (an apparent passenger in the taxicab who had entered the market during the robbery and had been ordered out by the assailant);

Count 6. Assault with Intent to Commit Murder in the First Degree upon the body of Robert Bell, Jr. --- Life Imprisonment; and

Count 7. Assault with Intent to Commit Murder in the First Degree upon the body of Louis E. Smith --- Life Imprisonment. R. 2-10, 173-175, Tr. Trial 764-66.[1].

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[1]. As the twenty (20) volumes of the 1,850 page transcript of the evidence are not consecutively numbered (but divided into the five (5) stages of the proceedings) references herein to the transcript (abbreviated "Tr.") will also identify the pertinent state (e.g. Tr. Trial, Tr. Sentencing Hearing, etc.). References to the technical record (abbreviated "R.") describe the proceedings before the trial court. References to the appellate record will identify the specific document as styled below (e.g. Appellant's Brief, Petition to Rehear, etc.).

Pursuant to Tenn. Code Ann. §39-2404(a) (1977), the sentencing hearing was conducted before the same jury on the 20th day of January, 1981 (the prosecution elected not to present proof of aggravating circumstances, arguing that the existence of such circumstances were already of record). Tr. Sentencing Hearing, 4, 9. The prosecution argued that they had already shown "that the defendant knowingly created a great risk of death to two (2) or more persons other than the murder victim"; "that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the petitioner or another"; and "that the murder was committed while the defendant was engaged in committing a robbery." Tr. Sentencing Hearing 7-8. See Tenn. Code Ann. §39-2404(i) (1977). The defense relied upon the statutory mitigating circumstances of the petitioner's youth and the absence of a significant prior criminal history, but also attempted to show the existence of two (2) other mitigating factors --- that the defendant's death would not benefit society and that his death would not comply with moral and ethical standards of conduct. Tr. Sentencing Hearing 10. See Tenn. Code Ann. §39-2404(j) (1977).

The jury soon returned to sentence the petitioner to death upon each of the three (3) convictions of murder in the first degree. Upon the count of the indictment involving the death of the child, they found all three (3) aggravating circumstances suggested by the prosecution. Upon the two (2) counts involving the death of the persons seated in the taxicab, the jury found, as aggravation, that the murders were committed for "the purpose of avoiding, interferring with, or preventing a lawful arrest or prosecution." Upon each count, the jury also found that there were no mitigating circumstances "sufficiently

substantial to outweigh" the statutory aggravating circumstances. Tr. Sentencing Hearing 126-27. The trial judge approved and adopted the verdicts, setting execution for May 20, 1981. Tr. Sentencing Hearing 129-30.

Petitioner filed a timely motion for a new trial with appended affidavits and, on the 9th day of March, the motion was heard upon the receipt of further testimony. Tr. Post-Trial, in general. A written order overruled the motion (A.E) and a timely appeal was perfected with an interim stay of execution. The direct appeal as of right was argued before the Supreme Court of Tennessee, which has exclusive jurisdiction of death-penalty appeals (see Tenn. Code Ann. §39-2406(a) (1977) and Tenn. R. Crim. P. 3(b)), on the 9th day of February, 1982. That court filed an opinion, which is wholly adverse to petitioner, on the 3rd day of May, 1982. A.A. The defense filed a petition to rehear on the 13th day of May and it was summarily denied on May 21st, 1982. A.B.

B. What facts are material to the questions presented for review?

The crime, itself, is well-described in the opinion of the Supreme Court of Tennessee. A.A. 2-4. As to the proof of petitioner's guilt, both survivors of the robbery identified the petitioner at trial as the assailant, although both had acknowledged exposure to extensive pretrial publicity featuring film and photographs of the defendant. Tr. Trial 52-53, 74-75, 93, 166-68.

The petitioner was also "identified" by a young woman, who contended that she had entered the market as a customer in the midst of the crime. Tr. Trial 280-87. Immediately recognizing both that a robbery was in progress and that Cecil Johnson (whom she claimed to have met) was the readily-

apparent robber, she testified that she calmly went to the rear of the market, selected some soft drinks, paid for her purchases at the counter where the three (3) victims and the robber were crowded, drove home to casually remark of the transpiring events to her loved ones, and first told police of the bizzarre experience nine (9) days after the petitioner's arrest. Tr. Trial 280-321.

Upon his voluntary surrender to the police on the day after the crime, Cecil Johnson had not made any inculpatory statements and claimed to have been elsewhere at the time of the episode. The murder weapon was never recovered, no proceeds of the robbery were found, no fingerprints were identified, no bloodstains were found on the defendant's clothes, and no physical evidence directly linked Cecil Johnson to the commission of the crime. Thus, the prosecution's proof originally rested solely upon the eyewitness identifications.

The petitioner defended by presenting an alibi, which was independently corroborated in a manner leaving only moments during which he could have committed the crime.[2] Denying any involvement, Cecil Johnson testified that, during this brief period, he was riding in an automobile driven by a casual acquaintance in route to his father's home, which was near the scene of the crime. Tr. Trial 470, 481-82.

When arrested, Johnson couldn't initially recall his acquaintance's name for either police investigators or his court-appointed defense attorney (Tr. Trial 492), but

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2. The precise time of the commission of the crime was closely explored by the defense at trial with contradictory estimates. See Appellant's Brief 46-50, 107-111. By their failure to cross-examine certain alibi witnesses and by their statements in closing argument, the prosecution appeared to concede at trial that Cecil Johnson was 29 minutes from the scene of the crime at 9:25 P.M., or later, and safely in his father's home at 10:00 P.M. See Appellant's Brief 108, n. 10. Thus, even the prosecution's theory of the case would leave only a few moments during which the petitioner could have accomplished the double-robbery and triple-murder, making good his escape.

investigators identified and found the man on the next day. Tr. Trial 347. He immediately corroborated Johnson's claim of absence from the scene of the crime, giving a twenty-five (25) page written statement to the defense and a twenty-seven (27) page typed account to the District Attorney's Office in interviews separated by only a few hours. Tr. Trial 391-94. Accompanying defense investigators to the nearby town he and Johnson had visited on the night of the crime, the witness retraced their movements and knocked on doors in a successful effort to discover other witnesses who could corroborate the emergent alibi. Tr. Trial 343, 347, 370-71. He met with Johnson's attorneys and defense investigators on numerous occasions, receiving them into his home. Tr. Trial 369-70, 389. Johnson's attorneys filed a notice of intent to rely upon an alibi defense, named the witness in their pleading, and caused a subpoena to issue for his testimony at trial. R. 36.

From July 6, 1980 until January 10, 1981, this critical witness continued to assist the defense in preparation for trial to begin on January 13th. In the weeks before trial, the prosecutors decided the witness' anticipated alibi testimony would be false and determined that he must also have been involved in the robbery-murder, although they admittedly had no proof of his guilt. Tr. Trial 597-98. Developing a "need to talk to" the witness (Tr. Post-Trial 72), they sought him through his retained counsel and bondsman, both of whom served the witness on an unrelated, pending burglary charge. Tr. Trial 339, 381, Tr. Post-Trial 72, 76. The witness' counsel was told by the prosecutor "that anytime that he was able to find him, whether morning, noon, or night, no matter what time, I would, I wanted to talk to him," but his offer was not successful in securing the cooperation of the defense witness. Tr. Post-Trial 73, 86.

On January 8th, the prosecutor told a police detective of his "need" to speak with the witness and the detective apparently understood the conversation as an instruction to produce the man.[3] Tr. Post-Trial 56, 62, 73. The detective passed the message to a patrolman assigned to the witness' neighborhood and, on the same evening, the patrolman successfully detained the witness after searching for him. Tr. Post-Trial 38, 40, 50-51. Although the patrolman testified that he had stopped the man for suspicion of planning a robbery and "arrested" the witness for the misdemeanors of public drunkeness and carrying a weapon for the purposes of going armed, the witness was not "booked" on the charge, was not committed to jail, was never released from custody on judicial authority, and was never prosecuted on the charges. Tr. Post-Trial 46-49, 54, 69-71. Instead, at 1:00 A.M. on January 9th, the witness was escorted into a locked and darkened courthouse by the detective, a prosecution investigator, the elected District Attorney General, and two (2) assistant prosecutors. Tr. Post-Trial 57, 66, 68. When the detective drove the witness back to his home at 4:00 A.M., he had recanted his alibi testimony. Tr. Post-Trial 69-70.

The witness, who had earlier been drinking and smoking "a little" marijuana, "told the same story" for the first hour and one-half until the District Attorney General instructed the detective, "well, it looks like we are not getting anywhere so we will just go on and take him back across the street" to where the police booking room and county jail are located.

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3. In the post-trial evidentiary proceedings, the detective responded "I can't answer that" when asked if it was his intention to arrest the witness on sight. When asked what he would have done if tht witness had politely refused the offer of escorted transportation to the Office of the District Attorney General, the detective answered "I don't know." Tr. Post-Trial 63.

Tr. Post-Trial 59. Tr. Trial 429. Although the witness had promptly requested the presence of his retained counsel, a prosecutor promised that the interrogation would avoid his pending burglary charge or his "arrest" of that evening, a representation which led the witness to withdraw his request for legal assistance. Tr. Trial 381-82, Tr. Post-Trial 76. However, the prospect of the witness being indicted, or "leaving himself open to be indicted, at some point in time" upon the same murder and robbery charges then pending against Cecil Johnson "did come up on more than one occasion", the prosecutors admitted. Tr. Post-Trial 81-83. The witness apparently understood this prospect, explaining "they said I was going to be convicted . . . I have been hearing that all the time." Tr. Trial 384. When asked why he recanted his alibi testimony at four o'clock that morning, the nineteen (19) year old witness replied "I was scared, you know, I was scared, but that was just it." Tr. Trial 336, 386.

After he recanted and on the day before trial, the witness and his counsel returned to the Office of the District Attorney General to preserve his newly-revised account in a written statement upon a promise of immunity should he be called to testify. Tr. Trial 366. The witness understood his "immunity" ("I can't hardly pronounce the word") to mean that he wasn't going to be charged with anything at all in reference to the market robbery and resulting murders if he testified for the State of Tennessee against Cecil Johnson, rather than as a witness for his defense. Tr. Trial 387-89.

Called to the stand to close the prosecution's case-in-chief at trial, the witness told the jury that Johnson had been in possession of a "dark" gun on the day of the killings and had earlier planned to rob a fried chicken outlet, if it had been open. Tr. Trial 347-349. Exiting the car near the

scene, Cecil Johnson, the witness claimed, said "he was going to rob Bob Bell (the market owner)" and "he said he was going to try to leave no witnesses." Tr. Trial 353. Meeting Johnson after the crime, the witness told the jury that he had received a portion of the cash proceeds of the robbery, retrieved the murder weapon from where Johnson had flung it into the low grass of a front yard near his father's home, and heard Johnson say "I didn't mean to shoot that boy." Tr. Trial 357-60, 416-418. The next morning, the witness said that he sold the pistol to a stranger, who was the first person he asked about buying the gun. Tr. Trial 419-21.

Admitting his previous inconsistent statements during cross-examination, the witness acknowledged that he had long insisted on Johnson's innocence and complete alibi, but recently changed his account. Tr. Trial 369-70, 389-94. Asked to reconcile the two (2) versions, the young witness twice told the jury "I told the truth then" in references to his original recollections of the alibi and insisted "I didn't tell no lies." Tr. Trial 352, 372-73. Upon this proof, the petitioner was convicted of three (3) counts of murder in the first degree, as well as sentenced to the maximum terms upon the other four (4) felony charges.

In opening statement upon the sentencing hearing, the District Attorney General speculated that there were only two (2) mitigating circumstances that he could conceive as pertinent to the petitioner --- that there was no significant history of prior criminal activities and that the defendant was young at the time of the commission of the crime. Tr. Sentencing Hearing 8. He advised the jury to reject the absence of a prior criminal record" in view of the enormity of the crime committed here" and volunteered his opinion that twenty-three (23) years of age wasn't "so youthful. I have assumed that that meant to apply to some juvenile or

very young defendant." Tr. Sentencing Hearing 8-9. The issue of the petitioner's youth as a mitigating circumstance was fully joined when defense counsel, in his opening statement, admitted reliance upon this factor, amongst others. Tr. Sentencing Hearing 10.

Petitioner presented testimony from his father and younger sister, both of whom described Cecil Johnson's childhood, teenage years, and early adulthood. Tr. Sentencing Hearing 19-33. They told of his mother's departure "to find a different life" when Cecil was five (5) years old and the resulting division of the eleven (11) children into three (3) groups, with only Cecil remaining with his father. Tr. Sentencing Hearing 21-22, 31. Dropping out of school at age fourteen (14) with hope of money and career, they recited a variety of jobs Cecil had held and his satisfaction with the hospital employment occupying him at the time of his arrest. Tr. Sentencing Hearing 22-25. His father recalled the extraordinary pride with which Cecil had constantly worn the hospital uniform as a public badge of his employment. Tr. Sentencing Hearing 24-25.

Later during the sentencing hearing, petitioner attempted to follow his family's evidence with the testimony of Dr. Thomas Wayne Ogletree, professor of theological ethics at Vanderbilt University Divinity School and a fellow in the Institute of Public Policy Studies. Tr. Sentencing Hearing 75-76. With unusual qualifications in his field, the trial court acknowledged his expertise and the jury heard the professor's definition of ethics. Tr. Sentencing Hearing 77. "For example," he stated, "in relationship to the crime which is presently before us . . . ," whereupon the prosecution objected upon unstated grounds and the jury was excused. Ibid. In their absence, Ogletree continued to explain that the death penalty involved the most elemental principle in western moral thought (i.e. that we do not harm others), but

that three (3) moral positions might be used to override that fundamental principle (absolute necessity to protect the lives of others, deterence of other persons from committing similar crimes, and, third, that the person deserves to die). Tr. Sentencing Hearing 79-83. Rejecting the first justification as inapplicable to this case and the second as morally unacceptable, he found a moral basis for the third position, which requires a conclusion that the person had full control of his life and was sufficiently master of himself that we could know beyond a reasonable doubt that he is fully accountable for what he has done. Tr. Sentencing Hearing 82-83.

Dr. Ogletree thought the age of the defendant to be significant from an ethical standpoint as research showed that most of us only began to develop the capability of independent moral judgment in our late teens and early adulthood. In principle, he said, it is impossible for a person of twenty-three (23) years of age to achieve that kind of genuine moral maturity that equates moral accountability. Tr. Sentencing Hearing 83-85. On cross-examination, the expert agreed that he had never talked to Cecil Johnson and could not presume to judge whether he had this emotional maturity, a decision which he viewed as a matter for the jury. Tr. Sentencing Hearing 86. Upon the prosecutor's claim that "all this is objectionable", the trial court sustained the protest and instructed the witness to stand down before returning the jury to the box. Ibid. Later, the trial judge interjected that he had sustained the blanket objection as the testimony had no probative value on the issue of punishment. Tr. Sentencing Hearing 88. Soon, the jury returned sentences of death upon each of the three (3) convictions of murder in the first degree. Tr. Sentencing Hearing 119-28.

C. How were the federal questions raised in the Court's below?

1. The federal questions concerning the prosecution's interference with the critical alibi witness were raised upon first discovery of the factual circumstances.

No pretrial objection was made to the State's treatment of the petitioner's critical alibi witness for the obvious reason that tht factual circumstances of his capture and interrogation were first revealed during his examination at trial (Tr. Trial 335-437) with further details being elicited during a post-trial evidentiary hearing. Tr. Post-Trial 36-90.

Within two (2) weeks of the crime (on July 17th, 1980), the prosecution had interrogated the witness resulting in a lengthy statement which wholly supported the petitioner's alibi. Tr. Trial 391-92, 580. Pursuant to Tennessee reciprocal discovery procedures, the defense officially notified the prosecution in November, 1980 of an intent to rely upon a defense of alibi by calling the witness, who was identified in the pleading by name and address. R. 36-37. The prosecution did not intercept the witness and induce his recantation of the anticipated alibi testimony until seventy-two (72) hours before the start of the trial (Tr. Trial 350-51) and the defense was first notified of the witness' possible prosecution testimony on the day before trial. Thus, no pretrial objections were possible in response to these last-minute developments.

Upon motion for a new trial, petitioner complained that these procedures denied "his right to a fair trial conducted in compliance with due process requirements and . . . hindered tht effectiveness of his counsel in preparing and presenting his defense." A.F-1. After a post-trial evidentiary hearing, the trial judge approved of the State's conduct and concluded "these matters address themselves primarily to the rights

of (the witness) . . . this Court doubts that the defendant has standing to complain of alleged violations of (the witness') rights." A.E-1.

On direct appeal, petitioner repeated this complaint as the first (1st) of three (3) propositions in support of his relief. Appellant's Brief 78-111. After citing seven (7) errors in the prosecution's treatment of his subpoenaed, alibi witness, petitioner argued that he had "constitutionally-protected rights to present a defense, to offer the testimony of witnesses, to compel their attendance, to prepare for trial through his counsel's investigation of the facts, and to confer with his witnesses without substantial interference." Appellant's Brief 92. Thus, he argued, his constitutional protections as a defendant extended over his critical witness "as he was escorted into a darkened courthouse at midnight seventy-two (72) hours before the trial began." Ibid. Citing cases from this Court supportive of his Sixth Amendment right to compulsory process and his Fourteenth Amendment due process rights to present his own witness to establish a defense (Appellant's Brief 93-95), petitioner argued that his witness' recantation had been unconstitutionally obtained and illegally presented with ultimate impact upon the verdicts. A.B-98.

The Supreme Court of Tennessee noted this argument in their opinion, although they construed it as an assertion that the prosecutorial actions had violated the witness' Fourth, Fifth and Sixth Amendment rights."[4] A.A-7 (see Petition for Rehearing 2-6). In this context, the appellate

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[4] The reported opinion's use of this phrase apparently reflects a misunderstanding of the legal significance of petitioner's argument for his brief does not even refer to the Fourth and Fifth Amendments and cites the Sixth and Fourteenth Amendment only in support of petitioner's independent rights. See Appellant's Brief 7, 93-94, 96 and Appellant's Petition for Rehearing 3.

court below found "no basis for the argument, either in fact or law," finding nothing in the record to show a violation of the witness' constitutional rights. A.A-8. Further, the court found that, even if the witness' rights had been violated by the prosecution, "these rights are personal to (the witness) and can only be asserted by him and not by some other person, such as appellant, who might be adversely affected by information elicited during the detention and interrogation (citing cases)." A.A 8-9.

Thus, the issue was raised at the earliest opportunity in the trial court, argued upon direct appeal, and addressed by the appellate opinion, even if the simple resolution misapprehended the point of petitioner's admittedly-complex argument.

2. The other complaints of prosecutorial misconduct were raised in various manners and argued to have accumulated with the witness intimidation to deny a fair trial complying with due process.

Petitioner concedes that his other five (5) complaints of prosecutorial misconduct are lesser in their individual scope and did not initially raise independent federal questions of a nature normally addressed by this Court in the exercise of its discretionary jurisdiction. However, petitioner argues, as he did below, that the magnitude of the issues surrounding the intimidation of his sole corroborative witness give an expanded significance to all other episodes of prosecutorial misconduct in a determination of whether the cumulative effect of the State's actions denied a trial complying with due process. That is, the sum of his lesser complaints reaches the magnitude of a federal question.

The first of these matters concerns declarative statements made by the prosecutor in the purported context of questions

during the direct examination of the petitioner's former alibi witness. The questions included a request for the witness to repeat certain out-of-court statements made by the prosecutor on the announced theory that it was relevant for the jury "to know that I (a prosecutor) didn't do anything to make him (the witness) tell me this." Tr. Trial 351. A contemporaneous initial objection was denied, a second objection was later sustained without a jury instruction to disregard the commentary, and a third episode of such questioning passed without interruption. Tr. Trial 351-52, 366. The matter was raised in the motion for a new trial (A.F-2-3) and the trial judge's response seems to acknowledge that the questions were improper, although he opined cured by the final instructions to the jury. A.E-2. Incorporated as a portion of the petitioner's cumulative complaint of misconduct upon appeal (Appellant's Brief 84-85), the Supreme Court of Tennessee found "no basis for the charge" when the matter was reviewed as an independent and self-sufficient allegation of error. A.A-9.

In closing argument, a prosecutor told the jury of his early opinion of the veracity of the intended alibi his anticipation of perjury in presentation of the alibi, his intent for the jury to benefit from "every piece, everything we know about this case," and his inability to find proof of the witness' complicity in the crime as his inspiration to seek out the defense witness to demand the "truth". Tr. Trial 597-98. Although the testimonial remarks were not subject to a contemporaneous objection, the issue was raised upon appeal as a component of the cumulative error (A.B 86-87) and the appellate court again found "no basis for the charge." A.A-9.

During his closing rebuttal argument, the District Attorney General told the jury of matters not in the record concerning his personal interest and motivation in the

prosecution, owing to his own daughter's school attendance with the youngest murder victim. Tr. Trial 674. He continued "it could have been my little girl that was in that store, a witness eliminated. It could have been you. It could have been your children. It could have been anyone of us, if we decided that we wanted to buy something from Bob Bell (the murder victim's father and market-owner) at 9:58 on July 5, 1980 we would have been dead." Ibid. Contemporaneous objection was not made, but the matter was highlighted in the motion for a new trial. A.F-3. The trial judge concurred that the comments were improper and admitted considering a curative instruction sua sponte, but he rejected the action in the opinion that, amongst other reasons, the proof of the defendant's guilt was so overwhelming that the remarks could have no effect on the jury's verdict. A.E-2-3. Further, he found "no errors in the record sufficiently sufficient to combine with the improper statement to produce a 'cumulative effect.'" Ibid. Despite this opinion, the impropriety was included in the petitioner's cumulative-effect argument upon appeal (Appellant's Brief 99-102), although the Supreme Court of Tennessee failed to address the issue even when its omission was emphasized in the petition for a rehearing. 6-7.

Fourth, the prosecution knowingly and intentionally withheld notice to the defense of the existence of an alleged eyewitness to the crime from July 15th, 1980 until January 2nd, 1981 (eleven days before the trial began). Tr. Trial 284-86. Tr. Post-Trial 87-90. This concealment occurred although the petitioner had filed a specific request for such discovery in September, 1980, recieved an immediate answer omitting notice of the existence of the witness, and theoretically benafited from an October 17th order granting his request for discovery. The petitioner complained of this neglect in his motion for a new trial (A.F-4) and the

trial judge responded that the matter was a "mere inadvertence." A.E-3. The problem was introduced on appeal as evidence of the cumulative effects of prosecutorial improprieties. Appellant's Brief 102-107. The Tennessee Supreme Court responded that the petitioner's complaint was tardy, that the notice had been provided within one (1) day of the minimum period required by the procedural rules, and that the trial record did not indicate that the failure of notice hindered the defense. A.A-10.

Finally, the prosecutor had triggered reciprocal discovery by filing a motion for notice of alibi, specifying the exact time of the offense in their September, 1980 pleading. R. 15. Yet, during the January trial, the prosecution called seven (7) witnesses who testified that the offense had been completed before the time specified in their earlier notice. See Appellant's Brief 46-50. While such a variance would not normally be of extraordinary significance, the alibi, as the prosecution was well aware, placed the petitioner in transit near the scene of the crime and in the sole company of his recanting witness at the earlier hour. Thus, the alteration in the time of the offense forced the petitioner to rely upon his intimidated witness, without benefit of independent corrobative witnesses available to establish his whereabouts at earlier and later times. Much of the testimony at trial focused upon the precise hour of the commission of the crime (see Appellant's Brief 46-50) and the misleading notice was cited in the motion for a new trial. A.F-4-5. The trial judge found this, too, to be a "mere inadvertance" without prejudice to the petitioner's rights and concluded that the prosecutor had "conducted both the investigation and the trial in a commendable manner, and in good faith as is inherent in his responsibility." A.E-3. Petitioner addressed the point as an additional episode of misconduct in his appeal (Appellant's Brief 107-111) and the

Tennessee Supreme Court ruled that "how he was prejudiced is not clear." A.A-10.

These five (5) assertions of misconduct were raised by the petitioner in his direct appeal in a single proposition, which also incorporated his complaints concerning the intimidation of his alibi witness, as follows: Did prosecutorial improprieties have a cumulative effect denying tht defendant's right to a fair trial complying with due process and hindering the effectiveness of his counsel in preparing and conducting the defense? A.B-9. Although the Supreme Court of Tennessee did not evaluate the incidents in the cumulative context urged by the petitioner, but simply disposed of each claim on its independent merit, the record establishes that the federal question was raised by the accumulation of these errors, each resulting from prosecutorial conduct. Petitioner has never claimed that the five (5) episodes each raise federal questions of independent vitality, but continues to argue that their accumulation resulted in a trial inconsistent with due process protections.

3. The federal constitutional issues as to the admissibility of general expert testimony upon mitigating circumstances at the sentencing hearing arose and were preserved at trial.

In the second (2nd) of the two (2) major questions which petitioner presents for review by this Court, he complains of tht trial court's exclusion of an expert witness, who would have testified as to the relationship between the petitioner's age and the accountability of youth for moral decision-making. Tr. Sentencing Hearing 75-88. The exclusion was based upon the trial judge's opinion that the tendered proof had "no probative value on the issue of punishment" and followed the opening statements of counsel during the

sentencing hearing, when both sides argued as to whether the petitioner could justly claim his age as qualifying under the statutory mitigation of "youth". Tr. Sentencing Hearing 9-10, 86-88.

The exclusion of the witness was protested by the defense, but the trial judge had already established his attitude upon the admission of mitigating evidence when he ruled upon the prosecutor's protest to the relevancy of defense witness who appeared earlier during the sentencing hearing. Citing cases from this Court and the Tennessee Supreme Court, the defense had orally argued that the petitioner was entitled to broad lattitude in the admission of potentially mitigating evidence and the trial judge had cited Lockett v. Ohio, 98 S. Ct. 2954, 2965 (1978) for the proposition that the Eight and Fourteenth Amendments required "a broad latitude, a mighty broad latitude." Tr. Sentencing Hearing 45-48, 57-62. The trial court had then admitted portions of the first witness' intended testimony, but excluded any testimony from the second witness, after a jury-out proceeding apparently convinced him that the evidence lacked any probative value. Thus, the federal constitutional issue as to the admission of testimony from the second witness had been raised before the expert even took the stand.

This exclusion was raised by the motion for new trial (A.F-7-8) and the trial judge responded that the expert had sought to tender an opinion "upon a subject which was within the grasp of ordinary men -- therefore, making the opinion unnecessary --- the Jury could navigate without it. Moreoever, the opinion was not predicated upon any fact proved on the trial, nor was it based on any examination of or conversation with the defendant." A.E-5. On appeal, petitioner argued that the evidentiary ruling deprived the jury of guidance needed to evaluate the defendant's mitigating circumstances and resulted in an arbitrary and capricious sentence of death.

Appellant's Brief 111-120. The Supreme Court of Tennessee opined that the pertinent Tennessee statute (Tenn. Code Ann. §39-2404(c) (1977) went even further than Lockett v. Ohio, supra, required, but held that the tendered evidence "was not relevant to, nor did it have any probative value on the issue of punishment, but consisted of matters properly to be considered by the legislature in deciding whether the death penalty is ever a justified punishment for a person convicted of murder in the first degree and, if so, the circumstances under which the death penalty should be imposed." A.A-11-13. On petition to reconsider, Cecil Johnson stressed the materiality of the testimony without success. 7-9.

REASONS SUPPORTING THE GRANT OF THE WRIT

I. As the opinions below erroneously rejected petitioner's constitutional complaints as an improper attempt to assert a defense witness' personal rights as an extension of a defendant's protections, this petition should be granted to provide a first opportunity to address the petitioner's due process claims.

As more fully described above in the Statement of the Case (§C - How the federal questions were raised in the courts below?), both the trial and appellate courts either misconstrued or neglected the petitioner's repeated claim that prosecutorial interference with his critical, alibi witness violated his due process right, as a criminal defendant, to present a defense. Both courts interpreted the petitioner's arguments as an attempt to extend or expand his constitutional protections through simple reliance upon the personal rights of a third-party witness.[5] See Petition to Rehear 2-6.

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[5] The trial judge held that the District Attorney General had a "sworn duty" to obtain the "true statement" of the critical defense witness and added "Moreover, this Court doubts that the defendant has standing to complain of alleged violations of (the witness') rights." A.E-1. The Tennessee Supreme Court found, first, that nothing in the record showed a violation of the witness' constitutional rights. Second, they held that, even if the witness' rights had been violated by law enforcement officials, "these rights are personal to (the witness) and can only be asserted by him and not by some other person, such as appellant, who might be adversely affected . . . " A.A-8 (emphasis added).

If the courts below had correctly analyzed the facts and the applicable law, petitioner could not be heard to complain of their conclusion as the result of such reasoning. Petitioner is well aware that substantial authority from this Court prohibits a defendant from hiding within the Fourth Amendment protections of another. Petitioner does not challenge the courts below upon their statement of a general proposition of law, but respectfully contends that their opinions misapprehend the crux of his argument.

Petitioner has repeatedly asserted that his claims are soundly based upon his Sixth Amendment right to compulsory process and his Fourteenth Amendment right to present a defense within the protections of due process of law. Washington v. Texas, 388 U.S. 14, 18 S. Ct. 1920, 18 L. Ed.2d 1019 (1967), and Webb v. Texas, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed.2d 330 (1972), both of which opinions are discussed below, clearly establish the petitioner's standing to make such a contention. Yet, the courts below neglected this well-established theory to rule adversely in reliance upon a different constitutional standard, which petitioner had never argued.

As tht questions presented for review by this Court are of constitutional significance and as these issues have never been addressed in the history of these proceedings, this Court should grant the petition and, thereby, provide a first opportunity to examine these due process claims.

II. Webb v. Texas and Washington v. Texas should be re-examined to define the extent to which their constitutional parameters include a defendant's due process rights to protect his preparation and presentation of a defense from prosecutorial interference.

Noting the great disparity between the posture of a presiding judge and a prison inmate called as the sole defense witness, this Court concluded that the unnecessarily strong terms used by the judge "could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." Webb v. Texas, 409 U.S. 95, 98, 93 S. Ct. 351, 34 L. Ed.2d 330 (1972). Reversing the conviction which followed the witness' refusal to testify. Webb held that the remarks "effectively drove the witness off the stand and thus deprived (Webb) of due process of law under the Fourteenth Amendment." Ibid. Although this duress was directed at a witness, the conduct deprived the defendant of his right to due process of law.

Webb cited the authority of Washington v. Texas, 388 U.S. 14, 18 S. Ct. 1920, 18 L. Ed.2d 1019 (1967), which held unconstitutional a statute prohibiting co-participants in a crime from testifying for one another (although either could testify for the state). 388 U.S. 17. Applying the Sixth Amendment right to compulsory process, this Court held that "the right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies . . . This right is a fundamental element of due process of law." Washington v. Texas, supra, 388 U.S. 18-19.

Both Webb v. Texas and Washington v. Texas have been extensively cited as general support for "the right to present a defense" and for the relationship between compulsory process and due process. Yet, both opinions present somewhat unique facts and only a rare case would squarely present a closely-analagous factual circumstance.

Webb and Washington were held by the Fifth Circuit Court of Appeals to control and require remand of a situation in which an FBI agent's suggestion that "trouble" in another jurisdiction would result if a defense witness "continued on" in his testimony and in which all defense witnesses were subpoenaed during the trial to appear before a grand jury for further investigation of the matter. United States v. Hammond, 598 F.2d 1008, 1012 (1979) (On Rehearing, 605 F.2d 862). The defense witnesses then refused to testify, although their anticipated evidence was stipulated, and the appellate court found substantial government interference with a defense witness' free and unhampered choice to testify in violation of the defendant's due process rights. Ibid.

Before Webb, the Fourth Circuit Court of Appeals had cited Washington v. Texas in support of the habeas corpus reversal of a conviction following the prosecutor's arrest (upon long-dorment, but related charges) of a subpoenaed defense witness, whose testimony might have mitigated the defendant's punishment. Bray v. Peyton, 429 F.2d 500, 501-02 (1970). More recently, both Webb and Washington were relied upon to grant a habeas corpus petition based on a trial judge's weekend detention of a testifying defense witness, who recanted on the witness stand after the trial judge had threatened to revoke his probation and charge him with perjury if his testimony was not truthful and consistent with his prior sworn testimony. Berg v. Morris, 483 F. Supp. 179, 181-83 (E.D. Cal. 1980). See, also, United States v. Morrison, 535 F.2d 223 (3rd Cir. 1976), United States v. Thomas, 488 F.2d 334 (6th Cir. 1973), and United States v. Harlin, 539 F.2d 679 (9th Cir. 1976), cert. den. 429 U.S. 742.

Despite the frequence general reliance on Webb and Washington, petitioner respectfully suggests that subsequent experience in the strict application of these authorities is somewhat episodal in that the case-made list of prohibited

practices grows slowly without clear constraint of future misconduct. Petitioner reads Webb and Washington as widely-sweeping decisions that should serve as explicit limitations on both judicial and prosecutorial interference with a defendant's preparation and presentation of his defense. Yet, the evolving case law has not provided such guidance, as is evident from the opinions below in this case which ignore these precedents.

Thus, petitioner urges re-examination of the parameters of Webb and Washington and suggests that this petition should be granted as an unique opportunity to clarify the extent to which the Fourteenth Amendment protects the preparation and presentation of a defense from prosecutorial interference.

III. This petition should be granted as the opinions below conflict with the decisions of this Court, federal courts of appeal, and another state court of last resort.

By reason of their complete failure to address the petitioner's claim of a violation of his due process right to present a defense while protected from prosecutorial interference, see §I above, petitioner asserts that the opinions of the courts below are in direct conflict with decisions of this Court in Washington v. Texas, supra at §II, and Webb v. Texas, supra at §II. It follows that the opinions below also conflict with decisions of the various federal courts of appeal which have construed Washington and Webb. See the cases cited in §II, including United States v. Hammond, Bray v. Peyton, United States v. Morrison, United States v. Thomas, and United States v. Harlin, all supra. See, generally, Annot. "Interference by Prosecution with Defense Counsel's Pretrial Interrogation of Witnesses," 90 ALR3d 1231.

Further, the opinions below also conflict with the en banc decision of the Supreme Court of the State of Washington in

Washington v. Burri, 550 P.2d 507 (1976). Burri, a larceny defendant, had filed a notice of alibi providing the prosecutor with the names, address and telephone numbers of six (6) alibi witnesses and had helpfully enclosed written statements by four (4) of the intended witnesses. Supra at 509. Under the apparent authority of a state statute authorizing sworn testimony in an ex parte "special inquiry hearing," the prosecutor summoned the six (6) defense witness, questioned each concerning the alibi, and excused them with instructions not to discuss their testimony with any other person. Supra at 509-10. The defense succeeded before the trial court in dismissing the indictment for this interference, although the prosecutor claimed that his intention was to investigate a separate crime --- a suspected conspiracy between the defendant and his witnesses to fabricate a perjured alibi. Ibid.

Upon the prosecutor's appeal, the Supreme Court of Washington upheld the dismissal in that the procedure violated the defendant's protected right to a fair trial, which right contemplates that the defendant will not be prejudiced by the denial of his right to counsel and compulsory attendance of witnesses. Burri, supra at 510-11. The prosecutor had tendered a transcript of the hearing to the defense, limited his instruction of silence to the specific testimony at the hearing, and put the witnesses at liberty to discuss their alibi testimony with the defense, so long as they avoided the subject of the hearing. Supra at 509. Although the record did not show "the extent of the prejudicial inhibitary effect of the prosecutor's action upon the witnesses," the Washington Supreme Court held that a defendant is denied his right to counsel if the actions of the prosecution deny the defense attorney an opportunity to prepare for trial, which includes a full investigation of the facts and the right to confer with

one's own witnesses. Supra at 511-13. Burri can not be factually distinguished from petitioner's circumstances because the procedure was conducted pursuant to an unusual statute as the statute was held to have been violated upon the authority of another case decided while Burri was on appeal and the opinion does not accuse the prosecutor of bad faith in assembling the inquiry. Supra at 510.

Petitioner brought Washington v. Burri to the attention of the Tennessee Supreme Court in his appellate brief (95-99) and in his oral argument, but the conflicting authority of another state court of last resort was apparently ignored or neglected.

Because of these conflicts with other controlling and persuasive decisions, which variances may be partially attributed to the failure of the courts below to address petitioner's constitutional claims, petitioner urges this Court to grant the petition to clarify the law and to enforce the mandates of its prior decisions.

IV. Granting this petition would permit this Court to better define how due process of law affects the evidentiary standards governing the relevancy and probative value of excluded testimony directed at a recognized mitigating circumstance at issue in a death-penalty sentencing hearing.

As the penalty of death is qualitatively different from any other punishment, Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978 (1976), this Court has held that consideration of relevant facets of the character and record of the individual offender, as well as the circumstances of the particular offense, is constitutionally required in capital sentencing. Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954 (1978). However, footnote 12 in the Lockett decision explained that

the opinion was not intended to limit the traditional authority of trial courts to exclude, as irrelevant, evidence not bearing on the defendant's character. Supra at 605. See the opinion below, A.A-12.

Although Cecil Johnson contended that the tendered testimony of his expert witness, Dr. Thomas Ogletree, bore upon his character by providing a structure within which the jury could have weighed the evidence of his family concerning his youth and moral maturity, the trial judge excluded the proof as lacking probative value on the issue of punishment, a ruling endorsed by Tennessee Supreme Court. A.A-13. Tr. Sentencing Hearing 88. Both courts below cited the authority of Lockett before excluding the evidence. A.A-12. Tr. Sentencing Hearing 60.

This record clearly establishes that the petitioner's ability to claim his youth in mitigation of his sentence was at issue and it is equally clear that "youth" is a relevant consideration in capital sentencing. Tenn. Code Ann. §39-2404(j)(7) (1977). See, also, Eddings v. Oklahoma, ___U.S.___, 102 S. Ct. 869, 876 (1982). Neither the pertinent Tennessee statute, nor Eddings, limit the mitigating factor of "youth" to a chronological age, although the District Attorney General told the jury that he had always "assumed" the consideration to apply only to "some juvenile or very young defendant." Tr. Sentencing Hearing 8-9. Thus, it would seem that whether a defendant convicted of capital murder may mitigate his sentence by reference to his "youth" is a consideration solely within the province of the jury. Yet, the judicial exclusion of tendered evidence directed toward the lay jury's determination of the issue deprives them of information helpful to their weighty deliberations and substitutes a vague rule of evidence for their constitutionally-mandated judgment of the individual offender.

Petitioner respectfully suggests that this Court did not intend Lockett as a broad rule to exclude evidence and petitioner reads Eddings as support for his view. No substantial competing state interest was urged to overcome the petitioner's attempt to exercise his Sixth Amendment right to present exculpatory evidence. See Washington v. Texas, supra, Chambers v. Mississippi, 410 U.S. 284, 382, 92 S. Ct. 1038 (1973), and McMorris v. Israel, 643 F.2d 458, 460-61 (7th Cir. 1981).

As this Court has made clear the existence of a relationship between due process of law and the general evidentiary standards governing the relevancy of testimony at a capital sentencing hearing, petitioner urges that his petition be granted to better define both this relationship and the effect of constitutional mandates upon judicial exclusion of tendered mitigating evidence as lacking in probative value.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Tennessee.

Respectfully submitted,

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*While neither attorney is currently a member of the bar of this Court, both are eligible for admission and will submit their applications within five (5) days of the filing of this petition.